THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STATE OF NEW YORK, et al.,	)	
	)	
Plaintiffs,	)	**Civil Action No. 16-4234**
	)	
vs.	)	
	)	**Hon. Mitchell S. Goldberg**
CEPHALON, INC., et al.,	)	
	)	
Defendants	)	
	)	

PLAINTIFFS' MOTION FOR EXTENSION OF TIME TO FILE CLAIMS, OR ALTERNATIVELY, TO ALLOW LATE-FILED CLAIMS, AND MEMORANDUM IN SUPPORT THEREOF

Plaintiff States[1] ("the States") respectfully move the Court for an Order extending the time by which "Eligible Consumers"[2] must act pursuant to the settlement entered into this action and preliminarily approved by this Court. The States seek an extension of the claims and objection deadline from April 13, 2017 until June 25, 2017, and an extension of the deadline for all briefs and materials in support of final approval until July 11, 2017. The extension will allow the States to complete notice efforts that took longer than anticipated and provide Eligible Consumers the benefit of the States and the settlement administrator's continuing efforts to reach those consumers. The extension will increase the number of claims filed, not prejudice any party, and not affect the

[1] The "States" are Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

[2] "Eligible Consumers" is defined as "natural persons who purchased Provigil and/or modafinil during the Relevant Period." *See* Mem. in Supp. of the States' Mot. for Prelim. Approval of Settlement and Proposed Consumer Notice and Distribution Plan and Entry of Order, at 1 n3, Aug. 4, 2016, D.I. 2.

hearing schedule approved by this Court. Extending the period of time for consumers to file claims or object under the States' settlement will also continue the potential for the States to coordinate consumer recovery with any consumer recovery secured by class counsel, which the States had anticipated and still hope will ultimately increase recovery available for consumers. Plaintiff States have notified Defendants in this action and class counsel (who the States understand have a signed Memorandum of Understanding in related litigation that includes consumer recovery) of the States' intention to make this motion. Although the States did not seek their consent (because neither have standing to object), neither the Defendants nor class counsel expressed any objection to this motion.

I. BACKGROUND

On July 28, 2016, Plaintiff States and Defendants entered into a Settlement Agreement resolving the States' investigation into Defendants' alleged anticompetitive conduct pertaining to the drug Provigil®. The Settlement includes $35 million to be distributed to Eligible Consumers by the States ("Settlement").

On August 4, 2016, Plaintiffs filed a Complaint and a motion seeking this Court's approval of the Settlement, which included a proposed notice and distribution plan for the $35 million ("Proposed Notice Plan"). As detailed in the Declaration of Linda V. Young, which accompanied the motion, the Proposed Notice Plan includes broad paid-media notice, including paid advertising in several print magazines and a newspaper supplement, banner-ads and/or "right-rail" ads on several digital media, as well as a banner ad on SleepReviewMag.com intended to reach sleep center personnel. In the Proposed Notice Plan, the States also proposed that their settlement administrator, A.B. Data, post case-related documents on its website, create a case specific website where Eligible Consumers and others could find information about the Settlement and other case-related information (www.stateagprovigilsettlement.com), and operate a 24-hour call center with a toll-free number (with live operators available to answer questions during business hours). Finally, the Proposed Notice Plan sought to increase notice to Eligible Consumers by seeking assistance from third parties. Pursuant to the Proposed Notice Plan, the States would contact doctors' offices, sleep centers and pharmacies to obtain assistance in notifying Eligible Consumers of the Settlement. These efforts included sending electronic Settlement notices, posting electronic website banner advertisements, and placing physical flyers in pharmacies and offices. Young Decl. ¶¶ 8-9, 12-18.

On November 7, 2016, this Court preliminarily approved the Proposed Notice Plan, by finding that it satisfies the requirements of state law and due process, and was "otherwise fair and reasonable." Order Granting Preliminary Approval, ¶ 9, D.I. 24. The Court ordered that the States "shall cause Notice substantially in the form of the Notice Plan to be disseminated by December 14, 2016," and ordered a final approval hearing on July 25, 2017. *Id.* ¶¶ 10, 14. Pursuant to the Notice Plan approved by the Court, Eligible Consumers seeking to file claims or object to the settlement must do so by April 13, 2017.

II. ARGUMENT

The States' request an Order extending the time for Eligible Consumers to file claims or object to the settlement from April 13, 2017 until June 25, 2017, or alternatively, permitting Eligible Consumers to file and the States to process claims until June 25, 2017. The States believe such an extension comports with the purpose of the Notice Plan because it will provide them with additional time necessary to further disseminate notice to Eligible Consumers, with more claims being filed.

A. The States Have Diligently Disseminated Notice

The States have complied with the Notice Plan and this Court's November 7, 2016 Order, having published the Settlement notice and disseminated it to the specified media by December 14, 2016, and having taken steps to provide direct notice to Eligible Consumers. To date, as detailed in the attached Declaration of Eric J. Miller, the States have done the following:

- Placed print advertising notifying natural persons of the action and the claims process in Parade magazine, which is inserted into approximately 620 newspapers;
- Placed print advertising notifying natural persons of the action and the claims process in the following national consumer magazines**:** Better Homes and Gardens, People, ESPN The Magazine, Reader's Digest, Good Housekeeping, and TV Guide;
- Placed banner ads and/or "right-rail" ads notifying natural persons of the action and the claims process on the following websites**:** Google, Facebook, and Yahoo!;
- Placed a banner ad on SleepReviewMag.com, a journal and website used by sleep specialist and sleep center personnel;
- Posted notice and case-related documents and information on both A.B. Data's website and a newly created website (www.stateagprovigilsettlement.com); and
- Created a toll- free telephone number, 877-236-1413, with trained, live service representatives able to assist during business hours. *See* Decl. of Eric J. Miller, ¶¶ 3-6,8, 15,16, attached as **Exhibit 1**.

In addition, pursuant to the Notice Plan, the States have also requested that the following third parties assist in notifying Eligible Consumers:

- The twenty-one largest pharmacies (nationwide), informing them of their obligation under this Court's Preliminary Approval Order to notify Eligible Consumers directly, as well as post banner ads on their websites and post physical flyers in their pharmacies;[3] and
- Doctors and sleep centers, requesting that they notify Eligible Consumers directly as well as post banner ads on their websites and post physical flyers in their facilities. Miller Decl. ¶¶ 7,10-14.

Despite these extensive efforts, to date only about 12,138 claims have been filed. Miller Decl. ¶17.

Although publication and other media notice is complete and a firm foundation built, additional time is needed to directly reach more Eligible Consumers. Direct notice from pharmacies requires considerable expenditure of time by the pharmacies (for which they may be compensated), and due to privacy and other concerns has required additional negotiations and considerations. Based on prior litigations, communications with consumers about the Settlement's claims process in this matter, and the timing of claims submitted to date (*i.e.* occurring mostly after direct notice was sent), the States' experience is that, after building a firm foundation, direct notice is the most effective means of reaching Eligible Consumers and thus should be pursued aggressively.

[3] The States contacted the following companies, which run retail and/or mail order pharmacies: Albertsons/Safeway, Winn-Dixie, CVS/Long's Drugs, Costco, Express Scripts, Food Lion, Harris Teeter, Kroger, HEB, Humana, Kmart, Kaiser Permanente, Medimpact, Prime Therapeutics, Meijer, OptumRx, Publix, Rite Aid, Wal-Mart/Sam's Club, Target, and Walgreens.

B. An Extension Would Allow the States to Take Additional Efforts to Increase Notice

The States wish to increase the number of claims filed by Eligible Consumers and thus propose continuing their efforts to follow up with pharmacies and pharmacy benefits managers that have already been contacted to encourage compliance with their obligations under the Court's Preliminary Approval Order.[4] Those efforts would be frustrated if the States informed consumers that claims could be filed after April 13, 2017, but the Court did not accept claims beyond that date. An order extending the time for Eligible Consumers to file claims or object, or permitting the States to accept late-filed claims or objections, would thus allow the States to proceed with efforts to further disseminate notice.

To date, of the twenty-one (21) retail and/or mail order pharmacies contacted, thirteen (13) have taken some action to notify Eligible Consumers. Miller Decl. at ¶13. Although some have declined to assist, others have been slow or otherwise delayed. If the Court extends the time by which Eligible Consumers may file claims, or alternatively allow late-filed claims and objections, the States will continue to pursue those entities which have not yet provided the requested notice (or not yet agreed to do so). Given that these are some of the largest pharmacies in the nation, their assistance is likely to increase filed claims substantially.

To increase the number of claims filed by Eligible Consumers, the States are also considering other actions not delineated in the Notice Plan, such as making targeted and localized efforts. For example, a pharmacy benefits manager has provided the States with voluminous data on Provigil® and/or modafinil dispensed to patients by pharmacies in their network (which includes many pharmacies not already contacted by the States). With additional

[4] The States, however, are not planning on resending or supplementing any publication or notice (either direct or media) regarding any Court approved extension of deadlines for filing a claim or an objection. The States believe this would both add confusion as well as not be cost effective.

time, the States could contact some of these pharmacies and request assistance in providing notice to Eligible Consumers, and are working with A.B. Data and others to identify a reasonable, cost-effective means by which to do so. The States are also considering reaching out to other relevant, local contacts, such as narcolepsy organizations, boards of pharmacies, and independent pharmacy trade associations to request assistance in disseminating notice. Extending the deadline to file claims would thus make a successful outcome more likely and beneficial for consumers.

C. An Extension Would Not Be Prejudicial or Require Delay of the Final Hearing

Extending the time for Eligible Consumers to file claims or object would not prejudice Defendants, or to the States' knowledge, any party to the action. The States informed Defendants and class counsel of their intent to file this motion and neither have objected or expressed any intention to do so (something the States do not believe they have standing to do). Extending the time to file claims or to object or request exclusion from the Settlement will not delay the scheduled hearing date, although it may alter the distribution to Eligible Consumers – which is why the States also seek an extension of the time to file all briefs and materials in support of final approval until July 11, 2017. And while the States' efforts may result in additional non-parties being contacted and requested to assist, all such efforts would be voluntary. In short, extending the time to file claims, or alternatively, permitting claims or objections after April 13, 2017, will improve notice and increase the number of consumer claims filed. And this may be especially important if issues in the class litigation are not resolved.[5]

[5] On September 9, 2016, Defendants filed suit against UnitedHealthCare Services, Inc. ("UHC"), alleging that UHC repudiated an agreement to settle. *Teva Pharm. Indus. et al v. United HealthCare Serv., Inc.*, No. 16-cv-4870-MSG (E.D.Pa.). The allegedly repudiated agreement was also entered into by parties in the End-Payor Class action, which thereafter was permitted to intervene in the action due to concerns of prejudice. *See* End-Payor Pl.'s Unopposed

While the Settlement anticipated coordinating consumer recovery in our action with any consumer recovery secured by class counsel, our efforts to disseminate notice and ultimately provide relief for Eligible Consumers may be even more important if such coordination continues to be delayed or does not occur.

Dated: April 7, 2017

Respectfully submitted,

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ATTORNEYS FOR THE STATE OF NEW YORK

Mot. to Intervene, No. 16-cv-4870 (Oct. 19, 2016), D.I.8, granted by the Court on October 27, 2016. Because the End-Payor Plaintiff's class also represents consumer claims, resolution of the UHC litigation may adversely affect consumers in the End-Payor Action.

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CERTIFICATE OF UNCONTESTED MOTION

Pursuant to Local Rule 7.1(b), the undersigned hereby certifies that the foregoing **Plaintiffs' Motion for Extension of Time to File Claims, or Alternatively, to Allow Late-Filed Claims**, is uncontested by Defendants Cephalon, Inc. et al.

/s/ Saami Zain

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2017, a true and correct copy of the foregoing **Plaintiffs' Motion for Extension of Time to File Claims, or Alternatively, to Allow Late-Filed Claims**, was electronically filed with the Clerk of the Court, is available for viewing and downloading from ECF system, and will be served by operation of the Court's electronic system (CM/ECF) upon all counsel of record.

/s/ Saami Zain